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No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decision of the United States Court of Claims in the above-entitled case.

OPINION BELOW

The opinion of the Court of Claims (R. 21-25) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 7, 1944 (R. 32). The motion of the United States for a new trial and for amended and additional findings of fact was overruled May 1, 1944 (R. 32). The jurisdiction of this Court is invoked under section 3 of the Act of 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The United States, in pursuance of a plan to improve navigation, erected a dam in the Mississippi River which raised the water level in the St. Croix River, a navigable tributary thereof. Respondent maintains a dam and hydroelectric plant at the mouth of the Willow River (a tributary of the St. Croix which the court below found to be non-navigable), so constructed as to draw water from the Willow River and discharge it directly into the St. Croix River. The effect of raising the level in the St. Croix was to reduce the operating head of water available to respondent for power production.

The question presented is whether the United States is liable for a reduction in respondent's available source of power resulting solely from an alteration in the flow of a navigable river.¹

STATEMENT

This is a suit brought by respondent in the Court of Claims to recover for property allegedly taken by the United States. That court gave judgment for respondent in the sum of \$25,000,

¹ Should certiorari be granted, we reserve the right to submit argument on the questions whether the finding that the ordinary high water level was 672 feet was based upon an erroneous test of "ordinary high water level;" whether in reaching it the court failed to give proper weight to the official records of the various stages of the river as shown by hydrographic gauges maintained by the United States Weather Bureau; and whether there was a lack of substantial evidence to support the finding.

with interest from August 12, 1938, at 4½% per annum.

Respondent is a public utility company incorporated under the laws of Wisconsin (R. 19).^{*} It operates four hydroelectric power plants on the Willow River in Wisconsin, one of which is located at Hudson, Wisconsin, near the confluence of that river and the St. Croix River (R. 19, 20). The St. Croix River joins the Mississippi River at Prescott, Wisconsin, about fifteen miles below Hudson (R. 20). From Prescott to Stillwater, Minnesota, a point above Hudson, the St. Croix is in the form of a greatly elongated lake, and is often referred to as Lake St. Croix (R. 20). It is undisputed that the St. Croix between Hudson and Prescott, and the Mississippi River below Prescott, are navigable. The Court of Claims has found that the Willow River is not navigable.

The Court of Claims made no finding as to the location and construction of respondent's dam and power plant at Hudson, Wisconsin, other than its finding that the plant was located on land owned by respondent above ordinary high-water level near the confluence of the Willow and St. Croix Rivers (R. 19). The undisputed proof disclosed, however, the following facts:

^{*}The printed record contains the findings of the Court of Claims (R. 19-21). We have filed with this Court a motion to dispense with printing the transcript of testimony before the Court of Claims, and this has been filed with the Court in original form. Since the transcript is not printed, references to it are indicated by "Tr."

Respondent maintains a dam across the Willow River, first erected as a logging dam in 1886, approximately $\frac{1}{2}$ to $\frac{3}{4}$ mile above the natural confluence of the Willow River with the St. Croix River (Tr. 7, 19, 23-24, 35). This dam is equipped with a spillway, which has not been opened for many years (Tr. 18, 298), so that the natural bed of the Willow River below the dam is dry save to the extent that water is backed up into it from the St. Croix River (Tr. 298). For about $1\frac{1}{2}$ to 2 miles above this dam, the Willow River is broadened out into a lake, known as Lake Mallalieu (Tr. 29), which is for part of its length separated from the St. Croix River only by a narrow neck of land. About 500-600 feet above the old logging dam (Tr. 25), respondent cut a channel through this neck of land at a point where it was about 150 feet wide (Tr. 24), and placed in it a new dam, equipped with tainter gates for the release of water (Defendant's Exhibit 7). Adjacent to the dam, respondent constructed its power plant (Tr. 24); Defendant's Exhibit 8). In its operation water taken in from Lake Mallalieu flowed past the generators and was discharged directly into the St. Croix River (Tr. 9). The draft tubes carrying the water from the turbines discharge into a tailrace constructed by respondent in the bed of the St. Croix River and extending laterally from the power house wall about 34 feet into that river (Tr. 20,

152-153), the discharge ends of the draft tubes being carried below the surface of the river.²

The testimony is further without dispute that the operating head of a dam such as respondent's dam at Hudson, which with the amount of water flow determines the power output (Tr. 93-94), depends upon the extent to which the elevation of the head water at the entrance to the turbines is greater than the elevation of the water at the discharge end of the draft tubes (Tr. 43, 93). Hence it is agreed that the power production of the dam is affected by any fluctuation in the level of either Lake Mallalieu or the St. Croix River, and that any raising of the level of the St. Croix River at Hudson proportionately reduced the power head at respondent's dam.

On August 12, 1938, the United States, pursuant to the Act of January 21, 1927, 44 Stat. 1010, 1013, and supplementary legislation, completed a dam in the Mississippi River at Red Wing, Minnesota, a point about fifteen miles below Prescott, Wisconsin (R. 20). The dam is of the roller type of construction and may be so operated as to permit the release of any desired amount of water (Tr. 217). Since its construction, it has, with some exceptions (Tr. 355),

² That the discharge ends of the draft tubes were so placed is shown by testimony that at one time of extreme low water when the ends of the draft tubes came out of water, it was found necessary in order to secure good operation to extend them so that they would lead below the surface of the St. Croix River (Tr. 21).

been so operated as to raise the level of the St. Croix River to a height, at Hudson, Wisconsin, of 675.3 feet above mean sea level (R. 20). When the level exceeds 675 feet at Red Wing (approximately 675.3 at Hudson), the dam is rolled up and the river allowed to flow as in a state of nature (Tr. 218). The Court of Claims found that the ordinary high water level obtaining at Hudson before the construction of the Red Wing dam was 672 feet and that the United States had raised the level about 3 feet (R. 20). The head of water at respondent's dam, which had been 17 feet when the St. Croix River was at 672 feet (R. 21) and had reached a maximum of $22\frac{1}{2}$ feet at lower stages of the St. Croix (R. 20), was thus reduced by about 3 feet.

The Court of Claims determined that the value of the loss in power at respondent's hydro-electric plant resulting from this raising of the level of the St. Croix River was \$25,000 (R. 21). The total recovery allowed by the Court was \$25,000 with interest, and it made no finding of any injury to respondent other than this loss of water power. No contention is made that the raising of the water level of the St. Croix River caused any physical injury to respondent's power plant or any flooding of its fast lands, nor is it denied that the Red Wing dam was constructed in the exercise of the constitutional power of the United States to improve the navigability of the Mississippi and St. Croix, both navigable rivers.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that there was a taking of respondent's property within the meaning of the Fifth Amendment although there was neither a claim nor a finding of any invasion of respondent's fast lands.

(2) In failing to hold that the raising by the Government of the water level of the St. Croix River above 672 feet mean sea level, which merely reduced the power which can be produced by respondent's hydroelectric facilities using water emptying into such stream, did not constitute a taking of respondent's property within the meaning of the Fifth Amendment.

(3) In failing to hold that the damage, if any, suffered by respondent as a result of raising the water level in the St. Croix River was consequential in nature for which just compensation is not recoverable.

(4) In holding in substance that respondent had a vested interest in the maintenance at its natural level of the water in a navigable stream.

(5) In failing to find that respondent's tailrace was an integral and essential part of its electric power plant and that it was located in the bed of the St. Croix River.

(6) In failing to hold that such disposition of respondent's tailrace in the bed of a navigable stream subjected it to the consequences of any rise above the ordinary high water level of that

stream resulting from any improvements of navigability.

(7) In finding that the ordinary high water mark of the St. Croix River was 672 feet and not 676 feet above mean sea level.

(8) In giving controlling weight to the vegetation test in determining the ordinary high water mark when gauge readings were available.

(9) In failing to give proper weight to the official gauge readings in determining the ordinary high water mark of the St. Croix River.

(10) In holding that the Willow River was a non-navigable stream.

(11) In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

The Court of Claims, resting its decision on *United States v. Cress*, 243 U. S. 316, has held the Government liable in damages for impairment of the power potential of respondent's power plant located thirty miles upstream from the Government's dam found to have caused the injury. It has done so although none of respondent's fast lands were invaded, or its physical property taken or destroyed. In so holding, we submit that the court below has improperly extended the rule of *United States v. Cress*, and has in effect accorded to respondent a property right in the flow of a navigable river for whose taking the United States must pay compensation, contrary to the rule of *United States v. Chandler-Dunbar Co.*, 229 U. S. 53. We submit further that the

decision below demonstrates the need for a determination as to whether the *Cress* case retains vitality as an authority. As limited by *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U. S. 592, the case rests upon a distinction between navigable and non-navigable waters which we think inadmissible, and in any event it is inconsistent with earlier and later decisions disallowing recovery for consequential damages.

1. The Court of Claims held that the United States is liable if it reduces the power head of water at a dam in a non-navigable stream. Accordingly, it held that the question here turned upon whether the Willow River was navigable. Finding that it was not, it thought the case was controlled by the decision in *United States v. Cress*. In this we submit that it erred.

The *Cress* case held the United States liable for the destruction of the power head at a mill-dam located in a non-navigable stream, the level of which below the dam had been raised as the result of the construction by the United States of a dam in a navigable stream.³ The basis of recovery was that the riparian owner had, under state law, a property right to have the water flow away from his land "as in the course of nature" (243 U. S. at

³ The opinion entitled *United States v. Cress* also deals with the companion case of *United States v. Kelly*, No. 718, and it is with the holding in the latter case (243 U. S. at 329-330) that we are here concerned.

330), which right, the Court concluded, the United States had taken by raising the water level of the nonnavigable stream.

But whatever may be the respective rights of the Government and a riparian owner in the natural flow of a non-navigable stream (see p. 12, *infra*), it is well settled that as against the paramount right of the Government to improve navigation "the flow of a navigable stream is in no sense private property". *United States v. Appalachian Power Co.*, 311 U. S. 377, at 424; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 69-70. Thus, compensation has been denied for impairment of the operating head of a dam in a navigable stream, *Barnes v. United States*, 46 C. Cls. 7; *Hood v. United States*, 46 C. Cls. 30; 49 C. Cls. 669; see *Coleman v. United States*, 181 Fed. 599, 601 (C. C. N. D. Ala.). The basis of these decisions is that the dam owner's "right to the use of the water" in a navigable stream "was not such a property right as entitled him to compensation" (46 C. Cls. at 29).⁴

Here the operating head at respondent's dam depends upon two factors, the level at the top of the dam of the Willow River, a non-navigable stream, and the level at its foot of the St. Croix

⁴ The power of the United States to improve navigation without liability to private owners is not limited to the removal of obstructions to navigation, *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U. S. 592, 597.

River, a navigable stream (see p. 5, *supra*). The United States in no way injured whatever riparian rights respondent may have had in the flow of the Willow River. The undisputed testimony shows that the construction of the Government's dam at Red Wing affected the power output of respondent's plant, if at all, only by raising the level of the St. Croix River into which its draft tubes discharge (see pp. 4-5, *supra*). Respondent's claim is thus based on an asserted right to the flow, as in a state of nature, of a navigable river, the St. Croix. The Court of Claims assumed that respondent was entitled to recovery if the Willow River was non-navigable, even though it found (R. 20) that the Red Wing dam did not affect the level of the Willow River, but only that of the navigable St. Croix River. In allowing recovery, the Court of Claims in effect has held, contrary to *United States v. Chandler-Dunbar Co.*, *supra*, and later cases, that a riparian owner has as against the Government such a right to the flow of a navigable river as to entitle him to compensation. This holding, we submit, finds no support in *United States v. Cress*.

2. The opinion in *United States v. Cress*, *supra*, made no distinction between the rights of riparian owners along navigable and non-navigable streams (243 U. S., at 319). Its reasoning rested upon the broad principle that the power of the Government to improve navigation without liability is

"confined to the natural condition of the stream" (243 U. S., at 326), so that for any alteration of the natural flow of either a navigable or non-navigable stream the Government is liable. For this proposition the Court relied on *United States v. Lynah*, 188 U. S. 445, a case which in that aspect was overruled in *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U. S. 592, 597. In the latter case the Court also distinguished and limited the *Cress* case, stating (p. 597):

What was said in the *Cress* case must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion.

While the Court thus departed from the rationale of the *Cress* case, it found it unnecessary to overrule it since it was distinguishable on its facts.

If the holding in *United States v. Cress* retains current validity in the face of the *Chandler-Dunbar* and other cases, it rests upon a distinction between navigable and non-navigable waters. The power of the United States to regulate commerce by water extends to whatever control of the non-navigable watershed of a navigable river

is needed for improvement of the navigation down stream (*Oklahoma v. Atkinson Co.*, 213 U. S. 508, 523). The liability on the part of the United States for an improvement in a navigable river cannot reasonably be said to depend on whether the project affected by the rise in the water level is above or below the point at which the stream, or a tributary, becomes navigable. We submit that the relative rights of the United States and of riparian owners are the same irrespective of whether the latter's properties are located above or below an artificial line denominated the "head of navigation." A similar question was presented to this Court but not decided in *United States ex rel T. V. A. v. Powelson*, 319 U. S. 266, and we refer the Court to our briefs in that case for a fuller statement of our position.

There is a further ground, not presented in the *Powelson* and *Chandler-Dunbar* cases, upon which we submit that the *Cress* case and the decision below are in error. In the former two cases there was an admitted taking of fast lands by condemnation proceedings; the only question was what elements of value and of damage were to be recognized in those proceedings. Here, there is a loss of power potential somewhat impairing the usefulness of respondent's power plant. Such an injury is a consequential damage which does "not amount to a taking under the constitution" (*Gibson v. United States*, 166 U. S.

269, 273-274). The impairment of respondent's operating power head caused by the building of a dam thirty miles away, accompanied by no invasion or destruction of physical property, is no less consequential in nature than was the destruction of the value of a wharf by the removing of the river channel involved in *Gibson v. United States*, 166 U. S. 269; or the impairment of drainage by raising the water level involved in *Mills v. United States*, 46 Fed. 758 (S. D. Ga.) and *Lynn v. United States*, 110 F. (2d) 586 (C. C. A. 5); or the subjection of levees to a greater burden involved in *Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Franklin v. United States* 101 F. (2d) 459 (C. C. A. 6) (affirmed on other grounds, 308 U. S. 516), and *Ross Construction Co. v. Yearsley*, 103 F. (2d) 589 (C. C. A. 8) (affirmed on other grounds, 309 U. S. 18).⁵ In the *Gibson* case the Court quoted with approval as stating "the general rule upon the subject" a Pennsylvania

⁵ This Court has found that there is a taking where there is a permanent flooding of fast lands outside the bed of the river, or even permanent liability to intermittent but inevitably recurring overflows (*Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Cress*, 243 U. S. 316; see *Sanguinetti v. United States*, 264 U. S. 146, 148-149; *Jacobs v. United States*, 290 U. S. 13, 16; *United States v. Sponenbarger*, 308 U. S. 256, 267). But it has recognized that these cases represent the "extremest qualification" of the rule that no recovery will be allowed for consequential damages, see *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *United States v. Sponenbarger*, 308 U. S., at 265.

decision⁶ which held that the loss of waterhead through the backing up of a stream was "mere consequential damage." We submit that to the extent that *United States v. Cress* allowed recovery in such circumstances, it is inconsistent with this recognized principle.⁷

CONCLUSION

For the reasons stated, it is submitted that the petition for writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

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⁶ *Monongahela Navigation Co. v. Coons*, 6 Watts & Searg. 101 (Pa. 1843).

⁷ This inconsistency between *United States v. Cress* and the cases cited on pages 13-14, *supra*, was recognized by the Circuit Court of Appeals for the Fifth Circuit in *Lynn v. United States*, 110 F. (2d) 586, 590, and for the Sixth Circuit in *Franklin v. United States*, 101 F. (2d) 459; both courts refused to follow the *Cress* case to the extent that it was there applicable.